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No. 95-809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCKHEED CORPORATION, *et al.*,
Petitioners,
v.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* THE AMERICAN ACADEMY OF ACTUARIES AND THE AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The American Academy of Actuaries and the American Society of Pension Actuaries submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of petitioners in No. 95-809, having obtained the written consent of both the petitioners and respondent to do so. Said consent accompanies this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for ac-

tuaries of all specialties (including pension and health) practicing in the United States. To become an Academy member, an actuary must satisfy rigorous education and experience requirements. Membership in the Academy is a prerequisite in many states for actuaries to be eligible to perform certain statutorily-required professional services. The Academy's membership exceeds 12,000 actuaries nationwide.

To articulate its purpose and guide its activities into the next century, the Academy in 1994 adopted the following Mission Statement:

> To ensure that the American public recognizes and benefits from (1) the independent expertise of the actuarial profession in the formulation of public policy, and (2) the adherence of actuaries to high professional standards in discharging their responsibilities.

Mission Statement, *Strategic Plan 1995-2000 of the American Academy of Actuaries* (1994).

The American Society of Pension Actuaries ("ASPA") is a nonprofit professional society whose members provide actuarial, administrative, consulting and other services for approximately one-third of the qualified pension plans in the United States. ASPA was established to

> advance actuarial science as applied to pension plans, promote high professional and ethical standards among its membership, facilitate the assembly of pension actuaries and consultants for the discussion of professional matters, and inform the public of the nature of the profession of the pension actuary and consultant."

Article I, Name and Purpose, *Bylaws of the American Society of Pension Actuaries.*

The Academy and ASPA have adopted a Code of Professional Conduct to govern the professional ethics of

their members.[1] Members who breach the Code may be publicly reprimanded, or suspended or expelled from membership. *See, e.g.*, Article IX, Sections 2 and 3, *Bylaws of the American Academy of Actuaries* (1995).[2]

The Academy regularly provides unbiased expertise to state legislatures, regulatory agencies and Congress on the actuarial implications of regulatory and legislative proposals involving insurance, health care and retirement income security.[3] ASPA, too, provides legislators and regulators with expert advice on the nation's pension system.[4] The Academy also participates as an *amicus curiae* in court cases with significant actuarial implications. For ex-

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[1] The Code of Professional Conduct and relevant portions of the Academy's bylaws are reproduced in the Appendix to this brief.

[2] To be eligible to provide actuarial services to employee benefit plans governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101 *et seq.*, an actuary must be licensed by the Joint Board for the Enrollment of Actuaries (the "Joint Board") of the United States Departments of Labor and the Treasury. The Joint Board has adopted its own regulations to govern the professional conduct of enrolled actuaries. *See* 20 C.F.R. § 901.20. Nearly all enrolled actuaries are members of the Academy or ASPA, and are subject to oversight by the Joint Board and the Academy, ASPA or both.

[3] The Academy recently identified flaws in Medicare reform plans put forward by both the Clinton Administration and Republican members of Congress. "Clinton's, GOP's Medicare Plans Seen As Flawed in Study by Actuaries Group," *The New York Times* (December 22, 1995). Last year, the Academy provided Congress with an analysis of costs to clean up sites on the Superfund National Priorities List. "Superfund Sites, Costs Overstated, American Academy of Actuaries Says," *Insurance Record* (Oct. 12, 1995). The Academy also advised Congress on a proposal to amend ERISA to allow employers to recapture "excess" plan assets. "Pension Reversions Included in GOP Budget Reconciliation Plan," *BNA's Daily Report for Executives* (Nov. 20, 1995) (citing letter of Pension Committee of the Academy).

[4] *See, e.g.*, "Clinton Plan provides Safe Harbors," *Pension Management* (Sept. 1995).

ample, in 1992 the Academy submitted an *amicus curiae* brief in support of the respondent in *William J. Mertens v. Hewitt Associates*, —— U.S. ——, 113 S. Ct. 2063 (1993) ("*Mertens*").

In *Mertens*, the Academy advised this Court that its many members who provide professional services to ERISA plans "work closely with plan fiduciaries," and could be significantly affected by the Court's ruling on whether non-fiduciaries could be held liable under ERISA for knowing participation in a fiduciary's breach of duty. The lower court's "party in interest" analysis in this case appears inconsistent with the Court's holding in *Mertens*. If left unaddressed, the lower court's reasoning may raise serious questions as to whether actuaries who provide professional services to ERISA plans but do not function as fiduciaries should nonetheless be subject to fiduciary liability. Such a result could be seriously injurious to practicing pension actuaries and, therefore, the Academy and ASPA have a substantial interest in that aspect of this case.[5]

SUMMARY OF ARGUMENT

This Court drew a clear distinction in *Mertens* between fiduciaries and non-fiduciary service providers for purposes of imposing fiduciary liability under ERISA. The lower court's decision threatens to blur this important distinction. The lower court found that petitioner Lockheed Corporation ("Lockheed") had engaged in a series of prohibited transfers of plan assets to itself as a "party in interest." ERISA clearly provides that only a fiduciary can initiate such prohibited transactions. However, the lower court expressly declined to rule whether Lockheed was acting as a fiduciary when it amended the plan (the only obvious point at which prohibited "party in interest" transactions could have been initiated), and failed to identify any other fiduciary act of Lockheed that could have initiated prohibited "party in interest" transactions. Thus the question of precisely what, if any, fiduciary action Lockheed took remains unanswered.

[5] This brief will address only the implications of the lower court's "party in interest" analysis, and will not argue the merits of other aspects of this case.

Unless this aspect of the lower court's decision is expressly addressed by the Court, federal courts in the Ninth Circuit and elsewhere will be left to struggle with the precedential effect of the lower court's reasoning when attempting to determine what kinds of actions constitute fiduciary transfers of plan assets to a "party in interest." In doing so, they may well exceed the existing definition of "fiduciary activity" under ERISA, expanding that definition to include actions that are currently undertaken by actuaries and other service providers on a non-fiduciary basis (for example, setting assumptions that reduce the employer's contribution). The Academy and ASPA urge the Court to address this aspect of the lower court's decision, and to emphasize that only fiduciaries as they are currently defined under ERISA can engage in fiduciary activity (again, as currently defined) and, thereby, be exposed to fiduciary liability.

ARGUMENT

In *Mertens*, this Court addressed the issue of whether actuaries who provided professional services to an ERISA plan, but who did not have control over the plan's assets, could be held liable for knowing participation in an alleged breach of duty by the plan's administrators.[6] The Court held that ERISA provides an express scheme of statutory remedies that does not include a cause of action for money damages against non-fiduciaries for knowing participation

[6] *Mertens* came before the Court on a motion to dismiss; the petitioners' allegations were, therefore, taken as true. 113 S. Ct. at 2065. Specifically, petitioners claimed that the plan's actuaries had knowingly acquiesced in the administrators' setting of unreasonable actuarial assumptions for the plan. *Id.* at 2065-66.

in a fiduciary's breach. 113 S. Ct. at 2066-68, 2071. In reaching this determination, the Court recognized that professional service providers such as actuaries are not liable as fiduciaries until they "cross the line from advisor to fiduciary," *id.* at 2071, by obtaining the control over plan assets that is required to confer fiduciary status and liability under ERISA. The Court, therefore, drew a clear distinction between service providers (who may be "parties in interest" under 29 U.S.C. § 1002(14)(B)) and fiduciaries for purpose of liability for money damages under ERISA.

The lower court's reasoning in this case threatens to blur *Mertens*' careful distinction between fiduciaries and service providers. Here, Lockheed amended its plan to offer increased retirement benefits (paid from the plan's surplus assets) to employees who volunteered for early retirement. To be eligible to participate in the early retirement program, employees were required to waive potential employment-related claims they might have against Lockheed. *Spink v. Lockheed Corporation*, 60 F.3d 616, 618-19 (9th Cir. 1995). There is no allegation that any plan assets were transferred directly to Lockheed from the plan. The lower court held that Lockheed, by using plan assets to "purchase" releases from its retiring employees, had initiated a series of transfers of plan assets to itself as a "party in interest," in violation of 29 U.S.C. § 1106. *Id.* at 623-24.

Section 1106 clearly prohibits *fiduciaries* from causing the plan to engage in prohibited "party in interest" transactions, and contemplates that a *fiduciary* must have initiated the transaction at issue. 29 U.S.C. § 1106 ("A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . ."). The lower court, therefore, should have determined that Lockheed took

some fiduciary action as a necessary predicate to a breach of 29 U.S.C. § 1106. However, the lower court expressly declined to rule on the issue of whether Lockheed acted as a fiduciary when it amended the plan (the most obvious "triggering event" for the allegedly prohibited transactions). 60 F.3d at 623 n.5. Further, the lower court failed to pinpoint specifically any other fiduciary act of Lockheed that might have initiated prohibited "party in interest" transactions.[7]

This Court has held that employers "are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans," *Curtiss-Wright Corp. v. Schoonejongen*, —— U.S. ——, 115 S. Ct. 1223, 1228 (1995), and that plans may be freely amended so long as the substantive conditions established by ERISA (*e.g.*, minimum funding, vesting and participation requirements) are satisfied. *Id.; Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983). These holdings clearly suggest that the employer does not act as a fiduciary when amending an ERISA plan. The lower court, however, may have implicitly ruled to the contrary (while refusing explicitly to do so). Alternatively, the lower court may have ignored 29 U.S.C. § 1106's requirement that a *fiduciary* initiate a prohibited "party in interest" transaction, or it might have perceived some other triggering fiduciary act of Lockheed without expressly identifying that act in its opinion. Conceivably, the lower court may even have ignored the distinction between fiduciaries and "parties in

[7] Some courts that have considered cases brought under 29 U.S.C. § 1106 have held that a "party in interest" who participates in a prohibited transaction may be subject to suit for equitable remedies. *See, e.g., Reich v. Stangl*, 73 F.3d 1027 (10th Cir. 1996) and cases cited therein; *see also Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988). These holdings do not, however, impose fiduciary liability on those parties in interest. Moreover, at least one of those courts has recognized that "the transactions specified in [29 U.S.C. § 1106] necessarily involve two parties: the fiduciary and the party in interest." *Stangl, supra.*

interest," and imposed fiduciary liability on Lockheed for acts it undertook as a "party in interest," but not as a fiduciary.

Whatever its reasoning, the lower court's decision has troubling implications for non-fiduciary service providers such as actuaries. If the lower court's "party in interest" analysis is not expressly clarified by the Court, federal courts in the Ninth Circuit and elsewhere will have to struggle with the precedential value of this mysterious aspect of the lower court's decision. In an effort to harmonize the requirements of 29 U.S.C. § 1106 with the lower court's "party in interest" analysis, the courts may well expand the functional definition of fiduciary action that is currently applied under ERISA. In doing so, they are likely to sweep in some or all of the advisory and ministerial tasks performed by actuaries and other service providers, imposing fiduciary liability upon those service providers even though they have no fiduciary responsibility for the plan.

This Court's decision in *Mertens* clearly recognizes that it is inappropriate to impose fiduciary liability upon service providers who do not possess fiduciary control over plan assets 113 S. Ct. at 2071 ("[ERISA] allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds."). Unless this Court clarifies the lower court's "party in interest" analysis, actuaries and other professionals who provide services to ERISA plans cannot anticipate when a court may deem them liable not merely as parties in interest, but as fiduciaries. For example, actuaries routinely select and apply assumptions to calculate the employer's annual contribution to the plan. If the actuary selects assumptions that reduce the employer's contribution, it is conceivable under the lower court's reasoning that the actuary would be deemed to have participated in a prohibited transfer of plan assets to the employer as a "party in interest," and that the actuary would be held liable as a fiduciary. Similarly, the actuary might advise

the employer of statutorily-permissible techniques that would reduce the employer's contribution. Again, under the lower court's reasoning, the actuary might be held liable as a fiduciary even though the actuary had no authority to implement the techniques in question. Such a result would be contrary to this Court's decision in *Mertens,* to existing law, and to fundamental fairness.

CONCLUSION

For the foregoing reasons, the Academy and ASPA respectfully request that the Court reject the lower court's "party in interest" analysis.

Respectfully submitted,

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February 29, 1996

APPENDIX

APPENDIX

Code of Professional Conduct of the American Academy of Actuaries and the American Society of Pension Actuaries

Preamble

The Precepts of this Code of Professional Conduct identify the professional and ethical standards with which an actuary must comply. The Annotations provide additional explanatory, educational, and advisory material to members of the actuarial profession on how the Precepts are to be interpreted and applied. An actuary must be familiar with, and keep current with revisions to, the Code of Professional Conduct and its Precepts and Annotations.

Professional Integrity

PRECEPT 1. An actuary shall act honestly and in a manner to uphold the reputation of the actuarial profession and to fulfill the profession's responsibility to the public.

ANNOTATION 1-1. An actuary fulfills the profession's responsibility to the public through compliance with this Code, and by offering actuarial advice, recommendations, and opinions that are the product of the actuary's exercise of professional judgment.

ANNOTATION 1-2. An actuary who pleads guilty to or is found guilty of any misdemeanor related to financial matters or any felony shall be presumed to have contravened Precept 1 of this Code, and shall be subject to the profession's counseling and discipline procedures.

ANNOTATION 1-3. An actuary shall not use a relationship with a third party to attempt to obtain illegal or materially improper treatment from such third party on behalf of a principal (*i.e.*, present or prospective client or employer).

PRECEPT 2. An actuary shall perform professional services with integrity, skill, and care.

ANNOTATION 2-1. "Professional services" refers to the rendering of advice, recommendations, or opinions based upon actuarial considerations, and also includes other services provided to a principal (*i.e.*, present or prospective client or employer) by one acting as an actuary.

Qualification Standards

PRECEPT 3. An actuary shall perform professional services only when the actuary is qualified to do so and meets applicable qualification standards.

ANNOTATION 3-1. It is the professional responsibility of the actuary to observe applicable qualification standards in the jurisdiction in which the actuary renders professional services, and to keep current regarding changes in these standards. For example, for practice in the United States, the Qualification Standards promulgated by the American Academy of Actuaries apply; for practice in Canada, the eligibility conditions promulgated by the Canadian Institute of Actuaries as set out in the Canadian Institute of Actuaries' bylaws apply.

Standards of Practice

PRECEPT 4. An actuary shall ensure that professional services performed by or under the direction of the actuary meet applicable standards of practice.

ANNOTATION 4-1. It is the professional responsibility of the actuary to observe applicable standards of practice in the jurisdiction in which the actuary renders professional services and to keep current regarding changes in these standards. For example, for practice in the United States, the Standards of Practice promulgated by the Actuarial Standards Board apply; for practice in Canada, the Standards of Practice promulgated by the Canadian Institute of Actuaries apply.

ANNOTATION 4-2. Where there is a question regarding the applicability of a standard of practice, the professional judgment of the actuary, taking into account the applicable accepted principles of actuarial practice, shall prevail.

Disclosure

PRECEPT 5. An actuary shall, in communicating professional findings, indicate clearly that the actuary is responsible for the findings.

ANNOTATION 5-1. An actuary who makes an actuarial communication should indicate clearly the extent to which the actuary or other source(s) are available to provide supplementary information and explanation.

ANNOTATION 5-2. An actuary who makes an actuarial communication assumes responsibility for it except to the extent the actuary disclaims responsibility by stating reliance on other sources. Reliance on other sources means making use of those sources without assuming responsibility therefor. A communication making use of such reliance should define the extent of reliance. An actuary may rely upon other sources for information except where limited or prohibited by applicable standards of practice.

ANNOTATION 5-3. Any written communication of professional findings must be signed with the name of the actuary who is responsible for it. The name of an organization with which the actuary is affiliated may be incorporated into the signature, but the actuary's responsibilities and those of the organization are not affected by the form of the signature.

PRECEPT 6. An actuary shall, in communicating professional findings, identify the principal(s) (*i.e.*, the client[s] or employer[s]) for whom such findings are made and shall describe the capacity in which the actuary serves.

PRECEPT 7. An actuary shall make full and timely disclosure to a principal (*i.e.*, present or prospective client or employer) of the sources of all direct and indirect compensation that the actuary or the actuary's firm may receive in relation to an assignment for which the actuary provides professional services for that principal.

ANNOTATION 7-1. An actuary who is not financially and organizationally independent concerning any matter related to the subject of an actuarial communication should disclose to the principal any pertinent relationship that is not apparent.

ANNOTATION 7-2. "Indirect compensation" is any material consideration received from any source in relation to any assignment for which the actuary provides professional services, other than direct remuneration for those services.

ANNOTATION 7-3. Actuaries employed by firms that operate in multiple sites are subject to the requirement of disclosure of sources of compensation that the actuary's firm may receive in relation to professional services with respect to a specific assignment for that principal, regardless of the location in which such compensation is received.

Conflict of Interest

PRECEPT 8. An actuary shall not perform professional services involving an actual or potential conflict of interest unless:

(a) the actuary's ability to act fairly is unimpaired; and

(b) there has been disclosure of the conflict to all known direct users whose interests would be affected by the conflict; and

(c) all such known direct users have expressly agreed to the performance of the services by the actuary.

ANNOTATION 8-1. A "direct user" of an actuary's services is a principal (*i.e.*, present or prospective client or employer) having the opportunity to select the actuary and able to communicate directly with the actuary about qualifications, work, and recommendations.

ANNOTATION 8-2. If the actuary is aware of any significant conflict between the interests of the direct user and the interests of another party relative to the actuary's work, the actuary should advise the direct user of the conflict. The actuary should also include appropriate qualifications or disclosures in any related actuarial communication.

Control of Work Product

PRECEPT 9. An actuary shall not perform professional services when the actuary has reason to believe that they may be used to mislead or to violate or evade the law.

ANNOTATION 9-1. Material prepared by an actuary may be used by another party in a way that may influence the actions of a third party. The actuary should recognize the risks of misquotation, misinterpretation, or other misuse of such material and should take reasonable steps to ensure that the material is clear and presented fairly and that the actuary is identified as responsible for the material as required by Precept 5 of this Code.

Confidentiality

PRECEPT 10. An actuary shall not disclose to another party any confidential information obtained through professional services performed for a principal (*i.e.*, client or employer) unless authorized to do so by the principal or required to do so by law.

ANNOTATION 10-1. "Confidential information" refers to information not in the public domain of which the actuary becomes aware in conjunction with the rendering of professional services to a principal. It may include information of a proprietary nature, information that is legally restricted from circulation, or information that the actuary has reason to believe the principal would not wish to be divulged.

Courtesy and Cooperation

PRECEPT 11. An actuary shall perform professional services and courtesy and shall cooperate with others in the principal's (*i.e.*, client's or employer's) interest.

ANNOTATION 11-1. Differences of opinion among actuaries may arise, particularly in choices of assumptions and methods. Discussions of such differences, whether directly between actuaries or in observations made to a principal by one actuary on the work of another, should be conducted objectively and with courtesy.

ANNOTATION 11-2. An actuary in the course of an engagement or employment may encounter a situation such that the best interest of the principal would be served by the actuary's setting out an alternative opinion to one expressed by another actuary together with an explanation of the factors that lend support to the alternative opinion. Nothing in this Code should be construed as preventing the actuary from expressing such an alternative opinion to the principal.

ANNOTATION 11-3. A principal has an indisputable right to choose a professional advisor. An actuary may provide service to any principal who requests it, even though such principal is being or has been served by another actuary in the same manner.

If an actuary is invited to advise a principal for whom the actuary knows or has reasonable grounds to believe that another actuary is already acting in a professional capacity with respect to the same matter or has recently so acted, it may be prudent to consult with the other actuary both to prepare adequately for the assignment and to make an informed judgment whether there are circumstances involving a potential violation of this Code that might affect acceptance of the assignment.

The prospective new or additional actuary should request the principal's consent to such consultation. When the principal has given consent, the original actuary may require reasonable compensation for the work required to assemble and transmit the relevant information such as pertinent data, work papers, and documents. The actuary need not provide any items of a proprietary nature, such as computer programs.

Advertising

PRECEPT 12. An actuary shall not engage in any advertising or business solicitation activities with respect to professional services that the actuary knows or should know are false or misleading.

ANNOTATION 12-1. "Advertising" encompasses all communications by whatever medium, including oral communications, that may directly or indirectly influence any person or organization to decide whether there is a need for actuarial services or to select a specific person or firm to perform actuarial services.

Titles and Designations

PRECEPT 13. An actuary shall make use of membership titles and designations of an actuarial organization only in a manner that conforms to the practices authorized by that organization.

ANNOTATION 13-1. "Title" means any title conferred by an actuarial organization related to a specific position within that organization. "Designation" means a specific reference to membership status within an actuarial organization.

Collateral Obligations

PRECEPT 14. An actuary with knowledge of an apparent, unresolved material violation of this Code shall disclose such violation to the appropriate counseling and discipline body of the profession, except where the disclosure would divulge confidential information or be contrary to law.

ANNOTATION 14-1. A material violation of this Code is one that is important, has influence or effect, or affects the merits of a situation, as opposed to one that is trivial, does not affect an outcome, or is one merely of form.

ANNOTATION 14-2. Except when an actuary is prohibited by law or while the actuary is acting in an adversarial environment involving another actuary or actuaries, when the actuary becomes aware of an apparent material violation of this Code, the actuary is required to undertake promptly the following course of action:

(a) If appropriate, discuss the situation with the other actuary or actuaries and, if necessary, agree upon a course of action to ensure that the apparent violation is resolved;

(b) If (a) is not appropriate or is not successful, bring the apparent violation to the attention of the appropriate investigatory body. For example, for violations of this Code arising out of practice in the United States, the actuary should refer the matter to the Actuarial Board for Counseling and Discipline; for violations of this Code arising out of practice in Canada, the actuary should follow procedures established by the Canadian Institute of Actuaries.

PRECEPT 15. An actuary or the actuary's representative shall respond promptly in writing to any letter received from a person duly authorized by the appropriate counseling and disciplinary body of the profession to obtain information or assistance regarding possible violations of this Code.

PRECEPT 16. An actuary shall abide by this Code of Professional Conduct whenever providing professional services.

ANNOTATION 16-1. Laws and regulations may impose obligations upon the actuary. Where the requirements of law or regulation conflict with this Code, the requirements of law or regulation shall take precedence.

ANNOTATION 16-2. For professional services rendered in Canada, the rules of the Canadian Institute of Actuaries apply.

ANNOTATION 16-3. For professional services rendered in Mexico, the rules of the Colegio Nacional de Actuarios apply.

Bylaws of the
American Academy of Actuaries
(adopted in 1965, most recently amended in 1995)

* * *

Article IX
Public Discipline

Section 1. Complaints and Referrals.

A. Complaints concerning alleged violations of the Academy's Code of Professional Conduct, and all questions that may arise as to the conduct of a member, in the member's relationship to the Academy or its members, or in the member's professional practice, or affecting the interests of the actuarial profession, constitute matters for serious consideration.

B. Such complaints and questions shall be referred to the national organization responsible for professionwide counseling and discipline in the nation where the action occurred: the Actuarial Board for Counseling and Discipline (ABCD) in the United States and the Canadian Institute of Actuaries (CIA) in Canada.

Section 2. Consideration of Public Disciplinary Action.

A. The President shall appoint a six-person Disciplinary Committee from among the members of the Board to consider and act on a recommendation from the ABCD or the CIA for public discipline of an Academy member.

B. Public disciplinary action includes a public reprimand, suspension of Academy membership, or expulsion from the Academy.

C. The member who is the subject of a public disciplinary recommendation from the ABCD or the CIA shall have the right to appear personally and by counsel (at the member's expense) before the Disci-

plinary Committee to explain why that recommendation should not be followed.

D. The member involved shall be notified not less than forty-five days in advance as to the time, date, and place where the Disciplinary Committee will consider the matter. The notification may be made by certified mail or in such other manner as the Disciplinary Committee may direct. The time limit may be waived by mutual agreement of the parties.

E. An action of the Disciplinary Committee to publicly reprimand, suspend, or expel a member requires an affirmative vote of two-thirds of the whole membership of the Disciplinary Committee.

F. An action by the Disciplinary Committee to publicly reprimand, suspend the membership of, or expel a member is effective forty-five days after the date of the action, if the member does not appeal the action to the Board, and, in the event of such an appeal, the action is effective on the date when the appeal is decided by the Board.

Section 3. Appeals to the Board. A member against whom an order of public reprimand, suspension, or expulsion has been rendered shall, upon application to the Board within forty-five days after the action of the Disciplinary Committee, be entitled to appeal to the Board at its next regularly scheduled meeting, under the following conditions:

A. All rights and privileges of membership shall be retained during the pendency of the appeal.

B. The notice of appeal shall be in writing and shall stipulate that the appealing member consents to the mailing to the members of the Board of a transcript and all applicable evidence in a form approved by the Disciplinary Committee.

C. The member may appear personally and by counsel (at the member's expense) before the Board when it meets to hear the appeal.

D. The decision of the Disciplinary Committee may be affirmed, reduced, or set aside by a majority of the members of the whole Board. Members of the Board who serve on the Disciplinary Committee may participate and vote in deliberations of the Board.

Section 4. Reinstatement. An individual who has been expelled or suspended from the Academy may be reinstated only through an action of the Board of Directors.

Section 5. Confidentiality of Proceedings. Except as otherwise provided in these Bylaws or by waiver of the person under investigation, all proceedings under this Article shall be confidential and kept secret.

Section 6. Notifications.

A. The Board of Directors shall notify Academy members in all instances in which a member is subject to public discipline. At the same time notification is given to the members, the Board of Directors shall also give notice of the public discipline to all other actuarial organizations of which the individual is a member and to other organizations, including governmental entities, that, in the opinion of the Board, should also receive notice of the action. The Board of Directors may also give notice of public discipline to such newspapers or journals as it may select.

B. If the case arises from a written complaint, notice of the disposition of the case shall be furnished to the complainant.

C. In the case of an action by the Disciplinary Committee to publicly reprimand, suspend, or expel a member, the notification should take place forty-five days after the Committee's action, and, if the

member is appealing the decision to the Board of Directors, the notification should state that the decision is being appealed. Once the Board of Directors has acted on this appeal, there should be a notification of that action.

D. In the event of subsequent reinstatement of an expelled or suspended member, the Board of Directors shall give notice of such action to all members and also to entities previously advised by the Board of the expulsion or suspension.